

§ 9.5

(ii) On Native American and Native Eskimo properties held in trust by the United States;

(iii) On lands used in connection with Federal programs for agricultural, recreational, and conservation purposes, including research in connection therewith;

(iv) On or used in connection with river, harbor, flood control, reclamation, or power projects; or for chemical manufacturing or development projects; or for nuclear production, research, or development projects;

(v) On or used in connection with housing and residential projects;

(vi) On properties of the United States Postal Service;

(vii) On military installations (including any fort, camp, post, naval training station, airfield, proving ground, military supply depot, military school, or any similar facility of the Department of Defense, but not including the Pentagon);

(viii) On installations of the National Aeronautic and Space Administration, except regular office buildings; and

(ix) On Department of Veterans Affairs installations used for hospital or domiciliary purposes.

(3) Buildings leased to the Government are not public buildings unless the building is leased pursuant to a lease-purchase contract.

§ 9.5 Which contracts are not covered by Executive Order 12933?

(a) A contract is not covered by the Executive Order unless it requires the provision of recurring building services, and unless the contract succeeds a contract for similar work at one or more of the same public building(s).

(b) The Executive Order expressly excludes:

(1) Contracts for services under the simplified acquisition threshold (\$100,000);

(2) Contracts for commodities or services produced or provided by the blind or severely handicapped, awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46-48a, and any future enacted law creating an employment preference for some group of workers under building service contracts;

(3) Guard, elevator operator, messenger, or custodial services provided

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to the Government under contracts with sheltered workshops employing the severely handicapped as outlined in the Edgar Amendment, section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Pub. L. 103-329;

(4) Agreements for vending facilities operated by the blind, entered into under the preference provisions of the Randolph-Sheppard Act, 20 U.S.C. 107; and

(5)(i) As explained in paragraph (b)(5)(ii) of this section, services where the contractor's employees perform work at the public building and at other locations under contracts not subject to the Executive Order and these regulations, provided that the employees are not deployed in a manner that is designed to avoid the purposes of the Order.

(ii) The successor contractor is not required to offer a right of first refusal for employment where a majority of the successor contractor's employees performing the particular service under the contract work at the public building and at other locations under contracts not subject to the Executive Order and these regulations. Examples include, but are not limited to, pest control or trash removal services where the employees periodically visit various Government and non-Government sites, and make service calls to repair equipment at various Government and non-Government buildings. This exclusion does not apply, however, where the service employees' work on non-covered contracts is not performed as a part of the same job as their work on the Federal contract in question, or where they separately apply for work on the non-Federal contracts. This exclusion also does not apply where the employees are deployed in a manner that is designed to avoid the purposes of the Executive Order. In making this determination, all the facts and circumstances are examined, including particularly the manner in which the predecessor contractor deployed its workforce to perform the services, the manner in which the work force is typically deployed to perform such services, and the manner in which the contract is structured.

CONTRACT CLAUSES

§ 9.6 What contract clauses must be included in covered contracts?

The clauses set forth in paragraphs (a) through (h) of this section shall be included in full by the contracting agency in every solicitation and contract entered into by the United States equal to or in excess of the simplified acquisition threshold of \$100,000, where the contract requires the provision of building services and succeeds a contract for the performance of similar services at one or more of the same public building(s), except that such clauses need not be included in any contract which is excluded from coverage of the Executive Order pursuant to paragraph (b)(2), (3) or (4) of § 9.5 of this part.

(a) Consistent with the efficient performance of this contract, the contractor shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal to employment under the contract in positions for which the employees are qualified. The contractor shall determine the number of employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) of this section, there shall be no employment opening under the contract, and the contractor shall not offer employment under the contract, to any person prior to having complied fully with this obligation. The contractor shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept such offer be less than 10 days.

(b) Notwithstanding the contractor's obligation under paragraph (a) of this section, the contractor:

(1) May employ on the contract any employee who has worked for the contractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, and

(2) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the McNamara-O'Hara Service Contract Act, 41 U.S.C. 357(b), and

(3) Is not required to offer a right of first refusal to any employee(s) of the predecessor contractor who the contractor reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(c) In accordance with paragraph (n) of the clause of this contract entitled "Service Contract Act of 1965, as Amended" and 29 CFR 4.6(l)(2), the contractor shall, no less than 60 days before completion of this contract, furnish the Contracting Officer with a certified list of the names of all service employees working at the Federal facility at the time the list is submitted. The list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each service employee, as appropriate. The Contracting Officer will provide the list to the successor contractor and the list shall be provided on request to employees or their representatives. Compliance with this paragraph shall constitute compliance with paragraph (n) of the clause entitled "Service Contract Act of 1965, as Amended" and 29 CFR 4.6(l)(2).

(Approved by the Office of Management and Budget under control numbers 1215-0150 and 1215-0190)

(d) The requirements of this clause do not apply to services where a majority of the contractor's employees performing the particular services under the contract work at the public building and at other locations under contracts not subject to Executive Order 12933, *provided* that the employees are not deployed in a manner that is designed to avoid the purposes of the Executive Order.

(e) If it is determined, pursuant to regulations issued by the Secretary of